Swiss Garden Rewards Sdn Bhd v Mohamed Ashrof Tambi bin Abdullah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-196–05 OF 2016
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
19 MAY 2017

Civil Procedure — Judicial review — Appeal against — Appellant terminated respondents from employment — Respondents referred matter to Industrial Court — Industrial Court held termination with just cause and excuse — Respondents filed judicial review against award given by Industrial Court — High Court found in favour of respondents and set aside Industrial Court's award — Whether High Court erred in disturbing finding of facts of Industrial Court — Whether there was procedural unfairness

Labour Law — Employment — Dismissal — Appellant terminated respondents from employment — Respondents referred matter to Industrial Court — Industrial Court held termination with just cause and excuse — Respondents filed judicial review against award given by Industrial Court — High Court found in favour of respondents and set aside Industrial Court's award — Whether respondents were dismissed or they were merely suspended — Whether respondents were working at MyRealtime while under the appellant's employment

On 6 June 2007, the respondents were suspended by the appellant from employment on the grounds that they were frequently not in the office during normal working hours and they were actively working in another company, MyRealtime Sdn Bhd, during working hours. Due to the failure of the respondents to respond to the show cause letters given by the appellant, the appellant terminated the respondents from employment. The respondents then referred the matter to the Industrial Court. Upon perusal of the evidence, inter alia, the evidence of COW1, COW2 and COW5, the Industrial Court found that the termination of the respondents were with just cause and excuse; and thus, dismissed the respondents' claim. Dissatisfied with the decision, the respondents filed a judicial review application in which the High Court found in favour of the respondents, hence the present appeal. The issues for determination were: (a) whether the respondents were dismissed on 6 June 2007 or whether they were merely suspended; and (b) whether the respondents were working at MyRealtime while under the appellant's employment.

Held, allowing the appeal, setting aside the orders of the High Court, restoring

Award No 1009 of 2014 handed down by the Industrial Court with costs of RM10,000:

(1) The learned High Court judge should not have disturbed the findings of fact of the learned chairman of the Industrial Court especially where those findings were based on credibility and demeanour of witnesses. Assessing credibility and demeanour of witnesses was not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. Thus, in the absence of evidence to show that the trial judge had gone plainly wrong, his or her perceptions should be given due weight (see para 37).

(2) The learned chairman of the Industrial Court had correctly weighed all the evidence in deciding that the respondents were working for MyRealtime during working hours. The learned High Court judge had no proper basis for concluding that the learned chairman of the Industrial Court had gone plainly wrong in her assessment of evidence. Her Ladyship erred in substituting with her own views for that of the learned chairman of the Industrial Court regarding the critical issues as to whether the respondents were dismissed on 6 June 2007 or merely suspended and whether the respondents were working at MyRealtime while under the appellant's employment (see paras 40–42).

(3) The issue of procedural fairness was a non-starter. The respondents were given ample opportunity to reply to the show cause letter but they failed to do so. In the circumstances, the appellant had no alternative but to deem that the alleged misconducts were in fact committed by the respondents and the respondents did not have any defence to offer (see para 43).

[Bahasa Malaysia summary

Pada 6 Jun 2007, responden-responden digantung kerja oleh perayu atas alasan bahawa mereka selalu tidak berada di dalam pejabat semasa waktu bekerja biasa dan mereka secara aktif bekerja di syarikat lain, MyRealtime Sdn Bhd, semasa waktu bekerja. Akibat kegagalan responden-responden untuk menjawab surat-surat tunjuk sebab yang diberikan oleh perayu, perayu menamatkan perkhidmatan responden-responden. Responden-responden kemudiannya merujuk perkara ke Mahkamah Perusahaan. Semasa meneliti keterangan, antara lain, keterangan COW1, COW2 dan COW5, Mahkamah Perusahaan mendapati bahawa penamatan perkhidmatan responden-responden adalah dengan sebab dan alasan adil; dan oleh itu, menolak tuntutan responden-responden. Tidak puas hati dengan keputusan, responden-responden memfailkan permohonan semakan kehakiman di mana Mahkamah Tinggi mendapati memihak responden-responden, maka rayuan

ini. Isu-isu untuk penentuan adalah: (a) sama ada responden-responden dibuang kerja pada 6 Jun 2007 atau sama ada mereka hanya digantung kerja; dan (b) sama ada responden-responden bekerja di MyRealtime semasa bekerja dengan perayu.

Diputuskan, membenarkan rayuan, mengetepikan perintah-perintah Mahkamah Tinggi, mengembalikan semula Award No 1009 Tahun 2014 yang diputuskan oleh Mahkamah Perusahaan dengan kos sebanyak RM10,000:

(1) Hakim Mahkamah Tinggi yang bijaksana tidak patut campur tangan dapatan fakta pengerusi Mahkamah Perusahaan yang bijaksana terutamanya di mana dapatan tersebut adalah berdasarkan atas kredibiliti dan tingkah laku saksi-saksi. Menilai kredibiliti dan tingkah laku saksi-saksi bukanlah sains. Adalah susah bagi hakim perbicaraan untuk menyebut dengan tepat percampuran kompleks tanggapan yang berbangkit selepas melihat dan mendengar saksi-saksi dan mencuba untuk menyelaraskan pelbagai versi kejadian. Oleh itu, dalam ketiadaan keterangan untuk menunjukkan bahawa hakim perbicaraan telah jelas salah, persepsi beliau sepatutnya diberikan pertimbangan yang wajar (lihat perenggan 37).

(2) Pengerusi Mahkamah Perusahaan yang bijaksana telah secara betul menimbang kesemua keterangan dalam memutuskan bahawa responden-responden bekerja dengan MyRealtime semasa waktu bekerja. Hakim Mahkamah Tinggi yang bijaksana tidak mempunyai asas betul untuk menyimpul bahawa pengerusi Mahkamah Perusahaan yang bijaksana telah secara jelas salah dalam penilaian keterangannya. Yang Arif tersilap dalam menggantikan pandangannya dengan pandangan pengerusi Mahkamah Perusahaan yang bijaksana berkaitan isu-isu kritikal terhadap sama ada responden-responden dibuang kerja pada 6 Jun 2007 atau hanya digantung kerja dan sama ada responden-responden bekerja di MyRealtime semasa bekerja dengan perayu (lihat perenggan 40–42).

(3) Isu keadilan prosedur bukanlah permulaan. Responden-responden diberi peluang yang banyak untuk menjawab surat tunjuk sebab tersebut tetapi mereka gagal berbuat sedemikian. Dalam keadaan, perayu tidak mempunyai alternatif tetapi menganggap bahawa salah laku yang didakwa tersebut adalah sebenarnya dilakukan oleh responden-responden dan responden-responden tidak mempunyai apa-apa pembelaan untuk ditawarkan (lihat perenggan 43).]

Notes

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) 5933–5935.

A For cases on dismissal, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1178–1258.

Cases referred to

B *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9, CA (refd)
Langsam v Beachcroft LLP [2012] EWCA Civ 1230, CA (refd)
Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)
C *Malaysian Oxygen Bhd v Soh Toh Who and Another Appeal* [2015] 3 MLJ 730, CA (refd)
Mcgraddie v Mcgraddie [2013] 1 WLR 2477, SC (refd)
National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144; [2000] 1 CLJ 681, CA (refd)
D *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)
Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
E *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235, CA (refd)

Appeal from: Application For Judicial Review No 25–132–12 of 2014 (High
F Court, Pulau Pinang)

Andrew Chiew (Thavalingam Thavarajah, Amandev Singh and Sharan Kaur Gill with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Selvarani a/p Naramasivoo (Selvarani Naramasivoo & Co) for the first, second,
G *third and fourth respondents.*

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

H

[1] This appeal is directed against the decision of the Penang High Court dated 3 May 2016, allowing the respondents' application for judicial review to quash Award No 1009 of 2014 dated 30 September 2014 handed down by the Industrial Court.

I

[2] After hearing both parties and after perusing the relevant material on record, we allowed the appeal with costs of RM10,000. We now give the detailed reasons for our decision.

ANTECEDENT FACTS

[3] The first to fourth respondents and one Mohamad Iddrus bin Samsudin were employed by the appellant to work at their branch office at Sungai Petani, Kedah.

[4] Sometime in April 2007, it was observed that the first to fourth respondents were frequently not in the office during the appellant's normal working hours, which were from 2pm–9.30pm. It was reported to Ivan Ting ('the appellant's general manager at headquarters') that the respondents were actively working in another company, MyRealtime Sdn Bhd ('MyRealtime'), during working hours.

[5] On 6 June 2007, Ivan Ting and Ivan Ng confronted the branch manager, Arunmoli, on the matter. Arunmoli admitted that he was aware of the respondents' absence for extended periods of time and that he knew they were working at MyRealtime.

[6] When they returned to the appellant's office at 4pm on 6 June 2007, Arunmoli informed them that they were immediately terminated by Mr Ivan Ting. Arunmoli then collected their access cards and asked them to leave the office immediately. Arunmoli then wrote an email dated 10 June 2007 to Ivan Ting. It reads as follows:

> ... As per your instruction verbally terminated above staff on 6 June 2007, kindly provide termination letter from the management. I had collected their access cards as per your instruction. Really appreciated should you can courier to SP branch ...

[7] Upon receiving the said email, Ivan Ting immediately called Arunmoli to correct him and told him that the respondents had only been suspended pending further action and had not been terminated as erroneously stated in the email. He also reminded Arunmoli that only the head office had the authority to dismiss employees.

[8] On 17 June 2007, the first to fourth respondents instructed their solicitors, Messrs Idris Awang & Co, to issue a letter to the appellant. It read as follows:

> Our client had been terminated on 6 June 2007 ... by your good selves without any notice and without any just cause or excuse ... let us know within 7 days from the date of this letter whether your good selves is making arrangement to reinstate our client ...

[9] On 18 June 2007, the appellant issued a show cause letter to the first to fourth respondents and Mohamad Iddrus bin Samsudin. They were alleged to

A have committed the following misconducts:

(a) gainfully employed by another company while still in the employment of the appellant;

(b) frequently absent from office during working hours; and

B

(c) unauthorised usage of confidential information.

[10] After receiving no response from the respondents within the prescribed time, the appellant then issued a reminder letter dated 25 June 2007 to the C respondents giving them an extension of time until 29 June 2007 to reply to the show cause letter. No reply was forthcoming from the respondents.

[11] On 11 July 2007, the respondents were terminated.

D

[12] The first to fourth respondents made representations to the Minister of Human Resources and the matter was then referred to the Industrial Court on 19 November 2007 for adjudication.

E **[13]** Meanwhile, on 14 March 2011, Arunmoli affirmed an affidavit. It reads as follows:

> The truth of the matter is that on 7 June 2007, I had met up Mr Ashrof upon his invitation and during the meeting, he persuaded me that I would most likely sacked by the company due to all that had happened. I expressed my feeling of loss and confusion of not knowing what to do, at which point he suggested that I should seek his lawyer's advice. At the meeting with lawyer, Ms Selvarani Naramasivoo at the office of Messrs Idris Awang & Co, on the same day, again I was told that I would most likely be sacked. Mr Ashrof asked me to support their case against the company since I was going to be sacked soon and had nothing to lose anyway. He then suggested that I send an email to Mr Ivan Ting, the contents of which will be drafted by Ms Selvarani. Ms Selvarani then typed out the contents of the email and passed it to me, a copy of which is annexed and marked as Exhibit A-1. She also scribbled on the said letter when going through the contents of it with me after that.

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H **[14]** The first to fourth respondents and Mohamad Iddrus made police reports on 3 April 2011 and 4 April 2011, respectively. They disputed the contents of Arunmoli's affidavit.

[15] On 4 May 2012, the Industrial Court received letter dated 26 April I 2011 from Mohamad Iddrus informing the court that he wished to withdraw his claim.

[16] The Industrial Court, on appraisal of the evidence, came to the conclusion that the termination of the first to fourth respondents was with just

cause and excuse. Accordingly, the Industrial Court dismissed the first to fourth respondents' claim.

[17] Dissatisfied with the award of Industrial Court, the first to fourth respondent brought the matter to the High Court by way of judicial review.

[18] The learned High Court judge allowed the first to fourth respondents application and held that the Industrial Court had erred in its decision that the termination was with just cause and excuse. The Industrial Court's award was set aside.

[19] Aggrieved with the decision of the learned High Court judge, the first to fourth respondents appealed to this court.

[20] We heard the appeal on 9 December 2016 at the end of which we unanimously allowed the same. We set aside the decision of the learned High Court judge and reinstated the award of the Industrial Court.

THE INDUSTRIAL COURT'S AWARD

[21] After hearing the parties, their witnesses, the detailed submissions by respective counsel, the learned chairman of the Industrial Court concluded that there were two key issues to be determined in this case:

(a) whether the first to fourth respondents were dismissed on 6 June 2007 or whether they were merely suspended; and

(b) whether the first to fourth respondents were working at MyRealtime while under the appellant's employment.

[22] As regards issue (a), the learned chairman of the Industrial Court found that the first to fourth respondents were verbally suspended on 6 June 2007 and they had subsequently failed to respond to the appellants' show cause letter of termination dated 11 July 2007.

[23] The learned chairman of the Industrial Court explained the reasons in concluding that the first to fourth respondents were merely suspended on 6 June 2007 as follows:

> COW2 adalah saksi penting dalam kes ini. Beliau pada mulanya merupakan salah seorang dari pihak menuntut tetapi kemudiannya telah menarik balik tuntutan beliau terhadap pihak responden. Dalam keterangannya beliau telah menceritakan apa yang sebenarnya berlaku pada hari kejadian tersebut. COW2 dengan jelas menyatakan dan mengesahkan bahawa COW5 telah memberitahu kepada semua pihak menuntut termasuk beliau ketika itu bahawa COW5 telah mendapat arahan lisan dari COW1 untuk memaklumkan kepada mereka bahawa mereka telah

digantung kerja sementara siasatan dijalankan. Walaupun COW5 telah disoal balas bertubi-tubi oleh peguam pihak menuntut, namun keterangan beliau adalah konsisten pada setiap masa. Mahkamah berpendapat COW2 adalah seorang saksi yang jujur dan boleh dipercayai dan dengan itu mahkamah menerima keterangan beliau tanpa sebarang keraguan. Oleh itu mahkamah mendapati pada 6 Jun 2007 pihak menuntut kedua hingga kelima hanya digantung kerja sahaja dan tidak diberhentikan kerja seperti yang didakwa oleh kesemua pihak menuntut.

(See pp 642–643 of the record of appeal, *Jld* 2(4), *Bahagian* C).

[24] As regards issue (b), the learned chairman of the Industrial Court made a finding of fact that the first to fourth respondents were working at MyRealtime based on the testimony of Palmoorthy s/o Surinarayana, a former employee of MyRealtime, the affidavit of Afifah bt Yusof, who affirmed statutory declaration deposing that the first to fourth respondents were frequently absent from the appellant's office during working hours; the MyRealtime name card of the first respondent and the attendance records of the first to fourth respondents.

THE APPEAL

[25] Before us, the principal attack mounted by learned counsel for the appellant upon the learned High Court judge's decision is based on arguments of law that a reviewing judge ought not to disturb the findings of the trial judge unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[26] Learned counsel posited that the findings of fact of the learned chairman of the Industrial Court in this instant appeal are not only in harmony with the preponderance of probabilities in the case but also based on the credibility and demeanour of the witnesses. Therefore, the conclusion of the learned chairman of the Industrial Court should not have been disturbed by the High Court judge.

[27] It is also a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be disturbed by reviewing courts unless it can be established that the trial judge's assessment of the fact was plainly wrong.

[28] In support of his submission, reliance was placed on the following cases:

(a) *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625;

(b) *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ

1; [2010] 8 CLJ 629; and

(c) *Malaysian Oxygen Bhd v Soh Toh Who and Another Appeal* [2015] 3 MLJ 730.

[29] In reply, learned counsel for the first to fourth respondents submitted that as a statement of principle, it is certainly correct to say that a reviewing court ought not to disturb the findings of fact of the trial judge. However, this is not to say that the High Court or this court cannot determine whether the findings of fact of the trial judge are supported by evidence or whether, in the light of the whole evidence on record, those findings are plainly wrong.

[30] Learned counsel further submitted that in this instant appeal the learned chairman of the Industrial Court failed to make an appropriate assessment of the evidence and failed to give credence to the evidence of the respondents' witnesses.

OUR DECISION

Issue (a)

[31] In reversing the findings of fact of the learned chairman of the Industrial Court that the first to fourth respondents were merely suspended on 6 June 2007 when they turned up at the appellant's office, the learned High Court judge stated:

> ... the Industrial Court ruled that *COW2 is a truthful witness* ... But perusal of the cause papers show COW2 is not a truthful witness ... His oral testimony is a 360 degree turn from his police report. His explanation that the contents of the police reports of all the applicants are similar does not answer why he now gives a different version. His explanation ought to have been rejected. Arunmoli (COW5) had testified that he was instructed by COW1 to inform the applicants that they were suspended on 6 June 2007 pending domestic inquiry. This testimony is in direct contrast with his email dated 10 June 2007. He also said that the email dated 10 June 2007 sent by him to COW1 was drafted by the applicant's lawyer, Miss Selvarani. *He is lying to the court.*
>
> ...
>
> Four years after the event on 6 June 2007, COW1 told COW5 that the email dated 10 June 2007 is wrong because the applicants were suspended, not terminated. Upon query by COW1, COW5 claims he was confused, panic, fear and threatened by the first applicant. These are all lies.
>
> ...
>
> *The second respondent's witnesses, especially COW2 and COW5 are proven to be liars*. Their evidence ought to have been rejected. (Emphasis added.)

[32] With respect to the learned High Court judge, we do not find

persuasive any of the reasons proffered by Her Ladyship in rejecting the evidence of COW2 and COW5 and in branding these witnesses as proven liars.

[33] We have scrutinised the evidence on record and found the findings of fact of the learned chairman of the Industrial Court are amply supported by the evidence. Ivan Ting, Mohamad Iddrus and Arunmoli all testified before the Industrial Court and maintained that the first to fourth respondents were merely suspended on 6 June 2007.

[34] The testimonies of these three witnesses (Ivan Ting, Mohamad Iddrus and Arunmoli), together with the show cause letters and the reminder letters, go to show that the first to fourth respondents were merely suspended on 6 June 2007. The learned chairman of the Industrial Court, having observed the demeanour of the witnesses, particularly Mohamad Iddrus and Arunmoli, was of the view that both their testimonies were consistent and unwavering. She found both witnesses to be truthful and gave due weight to their evidence.

[35] The correct approach of an appellate court or a reviewing court when invited to intervene with the factual findings of a trial judge was restated by the Supreme Court of United Kingdom in *Mcgraddie v Mcgraddie* [2013] 1 WLR 2477 and accurately summarised in the head note:

> It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong.
>
> Lewison LJ returned to the topic in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26.
>
> In a vivid passage at para 114 he said:
>
> > Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applied not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include:
> >
> > (a) The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> >
> > (b) The trial is not a dress rehearsal. It is the first and last night of the show.
> >
> > (c) Duplication of the trial judge's role on appeal is a disproportionate use the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> >
> > (d) In making his decisions the trial judge will have regard to the whole

of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

(e) The atmosphere of the court room cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

(f) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

(See also *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337).

[36] In this instant appeal, the learned chairman of the Industrial Court made important findings as regards the credibility of Arunmoli ('COW5') and Mohamad Iddrus ('COW2'). The learned chairman of the Industrial Court found both of them to be truthful witnesses.

[37] In our view, the learned High Court judge should not have disturbed the findings of fact of the learned chairman of the Industrial Court especially where those findings were based on credibility and demeanour of witnesses. Assessing credibility and demeanour of witnesses is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. Thus, in the absence of evidence to show that the trial judge had gone plainly wrong, his or her perceptions should be given due weight (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235, *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681, *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9).

[38] In *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230, the Court of Appeal of United Kingdom held:

> It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on

matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding (see *Datec Electronic Holdings v United Parcels Service* [2007] 1 WLR 1325 at para 46 per Lord Mance).

[39] As regards issue (b), there is substantial evidence, both oral and documentary, to support the learned chairman of the Industrial Court's findings.

[40] We agree with the submission of learned counsel for the appellant that the learned chairman of the Industrial Court had correctly weighed all the evidence in deciding that the first to fourth respondents were working for MyRealtime during working hours. At the risk of repetition, the evidence, inter alia, are as follows:

(a) the testimony of Palmoorthy s/o Surinarayana, a former employee of MyRealtime;

(b) the testimony of Afifah bt Yusof, the maker of statutory declaration affirming that the respondents were frequently absent from the office during working hours;

(c) the MyRealTime name card of the first respondent; and

(d) the attendance records of the respondents.

[41] In the grounds of judgment of the learned High Court judge, there was barren any reference to evidence mentioned above. The learned High Court judge did not consider all the relevant evidence in arriving at her conclusion.

[42] In summary, we are of the opinion that the learned High Court judge had no proper basis for concluding that the learned chairman of the Industrial Court had gone plainly wrong in her assessment of the evidence. Her Ladyship erred in substituting with her own views for that of the learned chairman of the Industrial Court regarding the critical issues as to whether the first to fourth respondents were dismissed on 6 June 2007 or merely suspended and whether the first to fourth respondents were working at MyRealtime while under the appellant's employment.

[43] The last point — procedural fairness — is a non-starter. The first to fourth respondents were given ample opportunity to reply to the show cause letter issued to them on 18 July 2007. However, they did not respond to the letter. In the circumstances, the appellant had no alternative but to deem that the alleged misconducts were in fact committed by the respondents and the respondents did not have any defence to offer.

[44] There is no doubt that the act of the respondents in moonlighting at MyRealtime and in refusing to respond to the appellants show cause letter are clearly acts of misconduct warranting dismissal.

CONCLUSION

[45] For the reasons already given, the appeal must succeed. The orders made by the High Court are set aside. We restored the Award No 1009 of 2014 dated 30 September 2014 handed down by the Industrial Court. The costs of this appeal shall be borne by the respondents in the sum of RM10,000. So ordered.

Appeal allowed; orders of the High Court set aside; Award No 1009 of 2014 handed down by the Industrial Court restored with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar